

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Requests for Review of Decisions of Universal)	
Service Administrator by Southwestern Bell)	
Telephone, L.P. and Centennial)	
Communications Corp.)	

**APPLICATION FOR REVIEW OF ACTION TAKEN PURSUANT TO
DELEGATED AUTHORITY**

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I. INTRODUCTION

Pursuant to section 1.115 of the Commission's rules,¹ AT&T Inc., on behalf of its wholly-owned subsidiaries, Southwestern Bell Telephone, L.P. (Southwestern Bell) and Centennial Communications Corp. (Centennial), respectfully requests that the Commission reverse the August 13, 2010 decision of the Wireline Competition Bureau (Bureau) to reject Southwestern Bell's and Centennial's revisions to FCC Form 499-A.² In its *Form 499 Revision Denial Order*, the Bureau denied ten petitions requesting that it reverse the Universal Service Administrative Company's (USAC) decision to reject these petitioners' Form 499 revisions because, according to USAC, those revisions were untimely filed. Included among the ten petitions were Southwestern Bell's Request for Review and Centennial's Request for Review. In denying these petitions, the Bureau concluded that none of the ten petitioners demonstrated good cause for their requested relief (i.e., a waiver of the deadline for filing revisions to the 499 forms) because each petitioner's claim of good cause "amounts to no more than simple negligence, petitioner error, or circumstances squarely within the petitioner's control."³ The Bureau also found that "federal law" requires the Bureau to reject the petitioners' waiver requests when the missed filing deadline resulted solely from negligence on the part of the filer.⁴

¹ 47 C.F.R. § 1.115.

² *Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, Requests for Review of Decisions of Universal Service Administrator by Airband Communications, Inc. et al.*, WC Docket No. 06-122, CC Docket No. 96-45, DA 10-1514 (rel. Aug. 13, 2010) (*Form 499 Revision Denial Order*); *AT&T Petition for Review of the Universal Service Administrative Company's Rejection of Revised Form 499-A*, CC Docket No. 96-45 (filed Aug. 6, 2006) (Southwestern Bell Request for Review); *Request for Review by Centennial Puerto Rico Operations Corp., and Centennial USVI Operations Corp. of Decision of Universal Service Administrator, and Petition for Waiver of the Deadline for Filing Revisions to Telecommunications Reporting Worksheet (FCC Form 499-A)*, CC Docket No. 96-45 (filed July 13, 2006) (Centennial Request for Review).

³ *Form 499 Revision Denial Order* at ¶ 8.

⁴ *Id.* at ¶ 7 (citing *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008) (*NetworkIP v. FCC*)).

The Commission should reverse the Bureau's *Form 499 Revision Denial Order* because the deadline that the Bureau is attempting to enforce in this order was never subject to notice and comment, and the Bureau lacked the authority to promulgate a substantive change to the Commission's contribution rules. It was therefore inappropriate for the Bureau to enforce this procedurally infirm deadline to the detriment of contributors that will otherwise contribute more than required by the Commission's rules. Moreover, despite its claim to the contrary, the Bureau has granted waivers of this filing deadline to similarly situated petitioners and, therefore, the Bureau acted arbitrarily in denying Southwestern Bell's and Centennial's Requests for Review.⁵ Finally, nothing in federal law precludes the Commission from granting AT&T the relief requested.

II. BACKGROUND

AT&T's 2005 Application for Review: In January 2005, AT&T filed an application for review, requesting that the Commission reverse the Bureau's *Form 499-A Modification Order*, in which the Bureau established a deadline for filing revisions to Form 499-A filings if the result of the revision would be a reduction in the provider's contribution (i.e., a refund of a previously made contribution). This deadline only applied, however, to decreases in contributions, not increases. Under the Bureau's *Form 499-A Modification Order*, a contributor could, at any time, file a revision that increased its prior year contributions, even if that revision was to a Form 499-A filing made many years earlier. The Bureau concluded that establishing a hard deadline for only those revisions that would decrease a provider's contributions "will help ensure the stability

⁵ Thus, the Bureau's "action involves the application of a precedent or policy which should be overturned or revised," 47 C.F.R. § 1.115(b)(2)(iii), and the Bureau's action "is in conflict with statute, regulation, case precedent, or established Commission policy," 47 C.F.R. § 1.115(b)(2)(i).

and sufficiency of the federal universal service fund . . . [and] a firm deadline for revised [Form 499-A filings] will improve the integrity of the universal service contribution methodology and promote efficiency in administration of the universal service support mechanisms, consistent with the Commission’s rules and policies.”⁶ Nowhere in this decision did the Bureau explain why this same rationale did not apply when a provider’s Form 499-A revision resulted in an *upward adjustment* to a contribution it made years earlier.

As AT&T explained in its 2005 application for review, which remains pending before the Commission, the Bureau’s decision to approve some revisions but not others plainly “encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.”⁷ As such, the Bureau had no authority to establish this asymmetrical deadline because the Commission only granted the Bureau the authority “to mak[e] changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.”⁸ Denying contributors the ability to recover overpayments after a certain period of time but simultaneously *requiring* them to file revisions if it would result in an increased contribution, regardless of how long ago the original contribution was made,⁹ is clearly a

⁶ *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 *et al.*, 20 FCC Rcd 1012, ¶ 10 (WCB 2004) (*Form 499-A Modification Order*).

⁷ SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority, CC Docket Nos. 96-45, 98-171, 97-21, at 9 (filed Jan. 10, 2005) (quoting *American Hospital Ass’n. v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)). Although this application for review was filed by SBC Communications Inc., we refer herein to this pleading as the “AT&T 2005 Application for Review.”

⁸ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms et al.*, CC Docket Nos. 96-45 *et al.*, FCC 99-175, ¶ 39 (rel. July 19, 1999) (explaining that such “administrative aspects” include “where and when worksheets are filed”).

⁹ Compare 2010 FCC Form 499-A Instructions at 11 (“A filer must submit a revised Worksheet if it discovers an error in the revenue data that it reports.”) with *id.* at 12 (“Filers shall submit any revised FCC

decisional rule that could only be promulgated by the Commission after it complied with section 553 of Administrative Procedures Act.¹⁰

Southwestern Bell Request for Review: In early 2006, Southwestern Bell determined that it had made several errors in reporting its 2004 calendar year revenues on its 2005 Form 499-A. The result of these errors was that Southwestern Bell paid almost \$250,000 more in 2004 than required by the Commission's rules.¹¹ Company personnel thus prepared a revised 2005 Form 499-A and Southwestern Bell's controller signed the revision, and it was mailed from Texas on March 24, 2006, one week before the March 31, 2006 deadline. Because of a clerical error, the signed revision was mailed back to the company personnel who prepared it, not USAC. This error was not discovered until April 3, one business day after 2005 Form 499-A revisions were due at USAC. AT&T personnel in Washington, D.C., were able to file Southwestern Bell's revision with USAC later that same day.¹² Several months later, USAC rejected Southwestern Bell's revision because "it was not filed within one year of the original submission."¹³ Southwestern Bell filed its Request for Review of USAC's decision with the Bureau on August 8, 2006.

In its Request for Review, Southwestern Bell presented two main arguments: First, as explained in the AT&T 2005 Application for Review, because the Bureau's one-year deadline

Form 499-A Worksheet that would result in decreased contributions by March 31 of the year after the original filing due date.").

¹⁰ AT&T 2005 Application for Review at 7-10.

¹¹ Southwestern Bell Request for Review at 2 (explaining that the bulk of the overpayment was caused by it mistakenly reporting certain wholesale revenues as retail revenues, and also noting that it revised its Total Uncollectible amounts in Line 421).

¹² *Id.* at 2-3.

¹³ *Id.* at 3 (citing Attachment 1).

for filing Form 499-A revisions that would reduce a provider's universal service contributions is invalid, so too is USAC's rejection of Southwestern Bell's 2005 Form 499-A revision, which USAC based entirely on that one-year deadline.¹⁴ Second, in the alternative, Southwestern Bell demonstrates good cause to warrant a waiver of this filing deadline because (a) AT&T (including its wholly-owned subsidiary, Southwestern Bell) has a history of submitting its Form 499 filings on time; (b) as soon as AT&T personnel discovered Southwestern Bell's filing error, they took immediate action to remedy the situation, filing the 2005 Form 499-A revision only one business day late; (c) since this error occurred, AT&T took action to prevent this one-time error from recurring;¹⁵ (d) Southwestern Bell's one-day delay did not in any way impair the administration of the universal service fund; and (e) absent a waiver, Southwestern Bell, and its customers, will have contributed almost a quarter million dollars more than was required under the Commission's rules, and thus more than Southwestern Bell's equitable share of the universal service support burden.¹⁶

Centennial Request for Review: Sometime prior to the 2005 Form 499-A revision deadline, Centennial personnel determined that Centennial's Puerto Rico and U.S. Virgin Islands affiliates contributed over \$750,000 more in calendar year 2004 than required under the Commission's rules. The individual responsible for filing these affiliates' revisions called USAC in the spring of 2006 to inquire about the filing deadline because April 1, 2006, fell on a

¹⁴ *Id.* at 4 (citing and attaching the AT&T 2005 Application for Review).

¹⁵ Specifically, AT&T established an internal e-mail confirmation process that alerts key employees when AT&T's Form 499 filings have been forwarded to USAC to enable those employees to track and ensure that the filings are made on time. *Id.* at 6.

¹⁶ *Id.* at 6-7.

Saturday.¹⁷ Despite having made clear that Centennial was filing revisions to its previously filed 2005 Forms 499-A, a USAC representative informed Centennial's employee that the filing was due on Monday, April 3. Centennial thus postmarked and mailed the revised 2005 Forms 499-A on Monday, April 3 and USAC received the documents on April 10, 2006. In May, USAC notified Centennial that it was "unable to accept the revision because it was not filed within one year of the original submission."¹⁸

Centennial asked that the Bureau reverse USAC's decision because it demonstrates good cause for a waiver of the Form 499-A one year revision deadline because (a) Centennial relied to its detriment on inaccurate information supplied by USAC; (b) Centennial's personnel responsible for Form 499 filings had always interpreted the filing deadline dates as "postmark" deadlines by which the forms must be mailed to USAC and, until USAC's rejection of the 2005 Form 499-A revisions, USAC had always accepted these filings as timely and thus never imposed late fees; (c) Centennial filed these revisions in its good faith belief that the forms were submitted in a timely manner;¹⁹ (d) USAC received Centennial's revisions barely a week after the filing deadline; (e) Centennial has taken steps to ensure that its future filings will be timely;²⁰ (f) denying Centennial the ability to recover over \$750,000 in overpayments will impose a hardship on it and will force it to contribute more than its equitable share of the universal service

¹⁷ Centennial Request for Review at 2.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 6 (citing *Benton/Linn Wireless, LLC et al.*, CC Docket No. 96-45, 20 FCC Rcd 19212 (WCB 2005)).

²⁰ In particular, Centennial's Finance team implemented: a calendar system, which specifies that forms must be received by their due dates, to ensure that there is no confusion about filing dates, a policy for using overnight couriers for the transmission of 499 forms, e-mail communication between the regulatory team on the mainland and the certifying officers in Puerto Rico and the US Virgin Islands to ensure that forms are ready for filing on time, and a requirement that certifying officers confirm timely filing with the regulatory group on the mainland. *Id.* at 7.

support burden; thus, while the amount in question is insignificant to the overall administration of the universal service fund, it means a great deal to a carrier of Centennial's size.²¹

II. DISCUSSION

A. **The Passage of Time Has Done Nothing to Remedy the Bureau's Procedurally Defective Deadline That It Now Seeks to Enforce Against Southwestern Bell and Centennial.**

Over five and a half years later, the Commission has yet to act on AT&T's application for review of the Bureau's unauthorized (and thus unlawful) and inappropriately decided *Form 499-A Modification Order*. In fact, its inertia has only compounded the significance of the Bureau's 2004 order. Since that time, the Bureau has rejected almost a dozen petitions, including Southwestern Bell's and Centennial's Requests for Review, based on its invalid deadline. The Commission should grant AT&T's 2005 application for review, together with the instant appeal, and direct USAC to accept Southwestern Bell's and Centennial's revised Form 499-A filings. Moreover, until the Commission issues final rules on this subject – after notice and comment – it should direct USAC to accept all other Form 499-A revisions that providers might file, which comply with the standard that pre-dated the Bureau's unlawful *Form 499-A Modification Order*, regardless of whether the providers made their original Form 499-A filings more than one year earlier.²²

In its Request for Review, Southwestern Bell contested the legitimacy of the Bureau's one-year revision deadline for refunds, explaining that insofar as that deadline is invalid, so too

²¹ *Id.* at 3-8.

²² See 2004 Form 499-A Instructions at 11 (explaining that revisions filed after December 1 of the same filing year “must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derive from corporate financial records”).

is USAC's rejection of Southwestern Bell's revised Form 499-A.²³ The Bureau ignores this aspect of the appeal and, instead, denies Southwestern Bell's Request for Review based solely on its finding that Southwestern Bell purportedly did not show good cause for a waiver of the filing deadline.²⁴ The Bureau erred by failing to address Southwestern Bell's primary argument for why it should reverse USAC's decision to reject Southwestern Bell's 2005 Form 499-A revision. On review, the Commission should correct this error and agree with Southwestern Bell that USAC's rejection of its revised filing is contrary to the Commission's rules and, along with the Bureau's order upholding USAC's decision, must be reversed. We do not repeat here the analysis contained in the AT&T 2005 Application for Review, which details why the Bureau's *Form 499-A Modification Order* is unlawful and inconsistent with the letter and spirit of the Commission's rules; instead, we incorporate that appeal by reference and we attach it hereto as an appendix.

B. The Bureau's Denial of Southwestern Bell's and Centennial's Requests for Review Is Inconsistent with Its Precedent of Waiving Its Form 499 Filing Deadlines.

The Bureau has acted arbitrarily and capriciously by denying Southwestern Bell's and Centennial's Requests for Review while granting similar requests by other carriers. Despite its assertion that "[a]dherence to deadlines and the good-cause standard for waivers is especially appropriate in the context of revisions to FCC Forms 499," the Bureau does not explain why it previously granted at least *seventeen* requests to waive the Form 499 filing deadlines in less than a twelve-month period. In three orders alone, dating from December 2007 through October 2008, the Bureau granted seventeen contributor requests for review of USAC's decisions to

²³ Southwestern Bell Request for Review at 4.

²⁴ *Form 499 Denial Order* at ¶ 8 & n.24.

reject an untimely submitted Form 499-Q filing²⁵ and to impose late fees associated with untimely submitted Form 499-A filings.²⁶ The Bureau’s inability to articulate any principled distinction between the purported basis for its denials in its *Form 499 Revision Denial Order* (i.e., “simple negligence, petitioner error, or circumstances squarely within the petitioner’s control”)²⁷ and the “simple negligence, petitioner error, or circumstances squarely within the petitioner’s control” that it previously found sufficiently compelling in order to grant seventeen waivers of Form 499 deadlines, demonstrates the arbitrariness of the *Form 499 Revision Denial Order*. Indeed, it is exactly these “opaque” waiver criteria that concerned the D.C. Circuit in *NetworkIP v. FCC* and prompted it to overturn the Commission’s decision to waive a statutory filing deadline.²⁸

In its *Aventure Order*, the Bureau explained that Aventure mistakenly input its total company revenues (including its significant access revenues generated by traffic pumping),²⁹ rather than only its revenues subject to universal service contributions, on its fourth quarter Form

²⁵ *Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, CC Docket No. 96-45, WC Docket No. 06-122, 23 FCC Rcd 10096 (2008) (*Aventure Order*).

²⁶ *Requests for Review of the Universal Service Administrator by Berkmont Communications Corporation et al.*, CC Docket No. 96-45, 22 FCC Rcd 21505 (2007) (*Berkmont et al. Order*); *Requests for Review of the Universal Service Administrator by CurryIP Solutions et al.*, WC Docket No. 06-122, 23 FCC Rcd 14661 (2008) (*CurryIP et al. Order*).

²⁷ *Form 499 Revision Denial Order* at ¶ 8.

²⁸ *NetworkIP v. FCC*, 548 F.3d at 127 (explaining that “[c]omplainants that the agency ‘likes’ can be excused, while ‘difficult’ defendants can find themselves drawing the short straw.”).

²⁹ See, e.g., *Qwest Communications Corporation vs. Superior Telephone Cooperative; Farmers Telephone Company of Riceville, Iowa; Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company d/b/a Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC*, Docket No. FCU-07-2, Final Order, State of Iowa, Department of Commerce, Utilities Board (issued Sept. 21, 2009).

499-Q filing.³⁰ These filings are due on November 1 of each year and revisions are due 45 days later.³¹ According to the Bureau's order, Aventure "did not realize its mistake until it received its next invoice from USAC," prompting it to file a revision on January 25, 2008, over thirty days after its revision was due.³² By the Bureau's own acknowledgement, Aventure, like Southwestern Bell and Centennial, fell prey to human error. In support of its decision to grant Aventure's request for review, the Bureau explained how (1) absent a waiver, Aventure will have overpaid into the fund but would not be reimbursed for that overpayment for over a year; (2) Aventure complied with USAC's "pay and dispute" policy; and (3) Aventure has put measures in place to ensure that such a filing error will not occur in the future.³³

Both Southwestern Bell and Centennial meet and exceed the *Aventure Order* criteria: not only have both entities overpaid into the fund, like Aventure, the Bureau has imposed an invalid procedural bar to prevent them from *ever* recovering their overpayments made over five years ago; both carriers have essentially complied with USAC's "pay and dispute" policy as both have paid in full the amounts that they are now disputing; and both carriers instituted measures to prevent similar filing errors from occurring in the future. In its request for review, Aventure claimed that its overpayment caused it "undue hardship."³⁴ The Bureau seems to have accepted Aventure's claim at face value and, based on the order, it appears that the Bureau did not ask Aventure to produce any documentation (e.g., most recent federal tax filing) to substantiate that

³⁰ *Aventure Order* at ¶ 2.

³¹ *Interim Contribution Methodology Order*, CC Docket Nos. 96-45 *et al.*, 17 FCC Rcd 24970, ¶ 36 (2002) (adopting the 45-day revision window for the Form 499-Q).

³² *Aventure Order* at ¶ 2.

³³ *Id.* at ¶ 5.

³⁴ *Aventure Order* at ¶ 5.

claim.³⁵ While Southwestern Bell did not claim any financial hardship if the Bureau did not grant its request, Centennial, which was not acquired by AT&T until 2009, did explain that, like Aventure, its \$751,019 overpayment made during calendar year 2004 was “significant” to a carrier its size and denying it the ability to recover that money would impose a “hardship” on it.³⁶ As it did in its *Aventure Order*, the Bureau should have accepted Centennial’s claim of financial hardship at face value. Finally, even though Southwestern Bell did not assert that denying its appeal would cause it “undue hardship,” whatever that might mean, it certainly opposed USAC’s decision to force it – and its customers – to bear an inequitable share of the universal service support burden.³⁷

In its *Berkmont et al. Order* and *CurryIP et al. Order*, the Bureau granted sixteen waivers of the Form 499-A filing deadline to contributors who did not receive USAC’s “courtesy copy” of the latest 499-A Instructions in the mail until shortly before or on April 2, 2007, the deadline for filing the 2007 Form 499-A.³⁸ According to the Bureau, “[b]ased on the Petitioners’ receipt of the FCC Form 499-A in close proximity to the filing deadline, their assertions of past compliance with filing deadlines, and the fact that they each filed their forms shortly after the deadline, Petitioners seek reversal of the late filing fees.”³⁹

³⁵ Moreover, it appears that the Bureau ignored Aventure’s significant traffic pumping revenue when it asserted that, absent a waiver of the Form 499-A filing revision deadline, Aventure would suffer “undue hardship.” Had the Bureau reviewed the numbers contained in its own order, it would have quickly realized that Aventure had the financial wherewithal to obtain a true-up of its erroneous filing in the normal course. See *Aventure Order* at ¶ 2 (by reporting its total quarterly revenues instead of its quarterly federal universal service assessable revenues, Aventure’s monthly contribution obligation increased from \$4,700/month to \$91,800/month).

³⁶ Centennial Request for Review at 3, 8.

³⁷ Southwestern Bell Request for Review at 6-7.

³⁸ *Berkmont et al. Order* at ¶¶ 3-4.

³⁹ *Berkmont et al. Order* at ¶ 4; *CurryIP et al. Order* at ¶ 5.

The Bureau granted the petitioners' requests to waive the Form 499-A filing deadline so as to reverse any late fees associated with their tardy filings. In explaining the "good cause" and "special circumstances" demonstrated by the petitioners, the Commission stated that (1) the Commission received OMB approval for the 2007 Form 499-A less than two weeks before forms were due; (2) USAC did not mail its courtesy copies until March 30; and (3) in the *Berkmont et al. Order*, all of the petitioners filed their Form 499-A within two weeks of the filing deadline.⁴⁰ While the Bureau applied the same scant analysis in its *CurryIP et al. Order*, it threw its "within two weeks of the filing deadline" standard out the window since one of the petitioners in that latter order did not file its Form 499-A until June 26.⁴¹

We note that the first two of the three Bureau-stated criteria could never constitute "special circumstances" since all contributors were equally affected by late OMB approval, which left all contributors – not just the petitioners – "a very short timeframe to review the revised instructions and complete the revised form,"⁴² and USAC e-mailed or mailed all registered filers its courtesy Form 499-A notification on the same day – March 30.⁴³ As for the last criterion (i.e., the petitioners submitted their Form 499-A filings "shortly after the filing deadline," which, based on the *CurryIP et al. Order* appendix, usually means within two weeks but no later than three months), both Southwestern Bell and Centennial meet and exceed that

⁴⁰ *Berkmont et al. Order* at ¶ 5.

⁴¹ *CurryIP et al. Order* at ¶ 6 & App.

⁴² *Berkmont et al. Order* at ¶ 6; *CurryIP et al. Order* at ¶ 5.

⁴³ *Berkmont et al. Order* at ¶ 3; *CurryIP et al. Order* at ¶ 3. While one could imagine that these two criteria might be "special circumstances" to first-time filers, based on the two orders, that does not appear to be the case. In both orders, the Bureau notes the petitioners' "past compliance with filing deadlines." *Berkmont et al. Order* at ¶ 4; *CurryIP et al. Order* at ¶ 5.

standard: Southwestern Bell filed its revision one business day late (or three calendar days late) and Centennial filed its revision six business days late (or ten calendar days late).

It should be plain from this discussion that, based on the Bureau's Form 499 waiver precedent, both Southwestern Bell and Centennial have demonstrated good cause to warrant a waiver of the Bureau's one-year deadline for Form 499-A revisions that result in a downward adjustment to a provider's contributions. Through its *Aventure*, *Berkmont et al.* and *CurryIP et al.* orders, the Bureau has exhibited a willingness to waive Form 499 filing deadlines for "everyday errors committed by employees or other people within the control of a petitioner."⁴⁴ Thus, the Bureau's attempt to hide behind the *NetworkIP v. FCC* decision ("in accordance with federal law, simple negligence on the part of a filer is insufficiently unique to justify waiver of the deadlines for revising FCC Forms 499")⁴⁵ is unsuccessful. Indeed, the arbitrariness that the Bureau has exhibited in its Form 499 decisions leaves "future [parties] – and this court – [with] no ability to evaluate the applicability and reasonableness of the Commission's waiver policy."⁴⁶ Moreover, unlike in *NetworkIP v. FCC*, where "there is no indication the FCC's practice is to accept those [late-filed] complaints,"⁴⁷ there are at least seventeen instances of the Bureau waiving Form 499 filing deadlines. Thus, while the D.C. Circuit concluded in *NetworkIP v. FCC* that, "under the applicable precedents and facts and circumstances of this case, the FCC's decision to waive its filing deadline was arbitrary and capricious," under the applicable

⁴⁴ *Form 499 Revision Denial Order* at n.23.

⁴⁵ *Id.* at ¶ 7 (citing *NetworkIP v. FCC*).

⁴⁶ *NetworkIP v. FCC*, 548 F.3d at 127 (first alteration in original).

⁴⁷ *Id.* at 128.

precedents and facts and circumstances of the instant proceeding, the Bureau's decision *not* to waive its filing deadline was arbitrary and capricious.

There are other differences between the deadline at issue in the *Form 499 Revision Denial Order* and the deadline before the D.C. Circuit in *NetworkIP v. FCC* that further demonstrate that this D.C. Circuit decision is inapposite to the Bureau decision which AT&T is appealing herein. The deadline in the *NetworkIP v. FCC* decision was the congressionally established two-year statute of limitations for “[a]ll complaints against carriers for the recovery of damages not based on overcharges. . . .”⁴⁸ The Commission established a rule that allows a complainant that had previously filed an informal complaint with the Commission to file a formal complaint that, for purposes of satisfying the two-year statute of limitations, relates back to the date it filed its informal complaint. In order to avail itself of this Commission rule, however, complainants must file their formal complaints within six months of the informal complaint.⁴⁹ The D.C. Circuit held that the Commission acted arbitrarily and capriciously when it waived this six-month deadline. In so doing, the Commission essentially waived the two-year statute of limitations in section 415(b), which it had no authority to do. Plainly the Commission should be held to a higher standard by the courts when it attempts to waive a statutorily mandated deadline. By contrast, there is nothing in the Commission's rules, let alone the relevant statute, to support the Bureau's asymmetrical Form 499-A revision deadline and petitioners seeking a waiver of that unlawful deadline should not be held to the same standard as required by the Commission in other contexts.

⁴⁸ *Id.* at 125 (quoting 47 U.S.C. § 4159b)).

⁴⁹ 47 C.F.R. § 1.718.

Although not mentioned by the Bureau in its *Form 499 Revision Denial Order*, the D.C. Circuit mentions another Commission order in its *NetworkIP v. FCC* decision that warrants discussion here. In *Meredith/New Heritage Strategic Partners, L.P.*, the Commission explained that, when a deadline “is not set by statute, but is regulatory in nature, the Commission may exercise its discretion and accept late-filed materials in appropriate circumstances, upon a showing of good cause. *Application of this standard varies in different circumstances.*”⁵⁰ For example, as noted with support by the D.C. Circuit, “the Commission requires that applicants seeking a waiver of filing deadlines must demonstrate ‘unusual or compelling circumstances’ for their waiver requests to be granted. Those circumstances must involve ‘a calamity of a widespread nature’ . . . such as an earthquake or a city-wide power outage which brings transportation to a halt.”⁵¹ By contrast, “in demonstrating good cause in connection with adjudicatory pleadings, a party before the Commission must provide a legitimate reason for not being able to file pleadings within the time specified.”⁵² As we described above, clearly Southwestern Bell and Centennial provided reasons in their Requests for Review that were as legitimate as – and, in many cases, identical to – those offered by the seventeen petitioners whose requests for waivers of Form 499 filing deadlines were granted.

Finally, we ask that the Commission address the profoundly adverse public policy consequences that the Bureau’s *Form 499-A Modification Order* has on contributors. As we explained in the AT&T 2005 Application for Review, if the Commission allows this Bureau decision to stand, contributors will be reluctant to review their prior year Form 499-A filings and

⁵⁰ *Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841, ¶ 6 (1994) (*Meredith*) (emphasis added).

⁵¹ *Id.*; see also *NetworkIP v. FCC*, 548 F.3d at 126.

⁵² *Meredith* at ¶ 7.

make any revisions to correct honest mistakes for fear that they will be liable for any underpayments but receive no credit for overpayments.⁵³ This Bureau order thus undermines the integrity of the universal service support program, which must rely on its contributors' good faith compliance with the Commission's reporting requirements.

III. CONCLUSION

For the reasons provided above, the Commission should overturn two wrongly decided Bureau decisions: the *Form 499 Revision Denial Order* and the 2004 *Form 499-A Modification Order*. We also ask that the Commission direct USAC to accept the Southwestern Bell's and Centennial's late-filed 2005 Form 499-A revisions.

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⁵³ AT&T 2005 Application for Review at 12-13.

APPENDIX

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
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1998 Biennial Regulatory Review –)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration of)	
Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	
Changes to the Board of Directors of)	CC Docket No. 97-21
The National Exchange Carrier Association)	
)	

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I. INTRODUCTION AND SUMMARY.

SBC Communications Inc., on behalf of itself and its wholly-owned subsidiaries Ohio Bell Telephone Company, Michigan Bell Telephone Company, and Indiana Bell Telephone Company (collectively, “SBC”), and pursuant to section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, respectfully requests that the Commission reverse the December 9, 2004, decision of the Wireline Competition Bureau (“Bureau”) to reject as untimely any revisions to a carrier’s Form 499-A Telecommunications Reporting Worksheet (“Form 499-A”) that would result in decreased contributions to federal support mechanisms if the revision is not submitted within 12 months of the due date of the original filing. Although the Bureau couches its decision as a mere “update” to the “Instructions to the Telecommunications Reporting Worksheet” that purportedly makes “procedural, non-substantive changes to the administrative aspects of the reporting requirements,”¹ the Bureau’s order establishes a new, substantive rule that affords disparate treatment to revisions depending on whether they would increase or decrease a carrier’s contributions – as discussed below, the Bureau imposed no limit on the obligation to file revisions if the revisions would increase a carrier’s contributions. The Bureau’s decision plainly reflects a substantive, value judgment about which Form 499-A revisions will be accepted more than one year after the original deadline, and thus determines who must contribute what to the universal service program. As such, the Bureau’s decision goes to the substance of the underlying program, and not merely to the “administrative aspects of the reporting requirements,

¹ *Federal State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, Order, CC Docket Nos. 96-45, 98-171, 97-21, DA 04-3669 at paras. 1, 10 n.31. (rel. Dec. 9, 2004) (*Form 499-A Modification Order*).

such as ‘where and when worksheets are filed,’”² and, consequently, goes beyond the scope of the authority delegated to the Bureau.³

Even if the Bureau had authority to adopt a new, firm deadline for filing revised Form 499-As, its decision to impose such a deadline for revisions that would result in decreased contributions, but not increased contributions, is patently arbitrary and an abuse of discretion. Moreover, as explained herein, if allowed to stand, the Bureau’s decision would be profoundly bad policy, encouraging carriers not to correct errors in reported revenues on their Form 499-As. In addition, the Bureau’s remand to USAC of SBC’s six revised Form 499-As with directions to accept those filings only “if there is good cause to allow revisions beyond the deadline contained in the Instructions” is inconsistent with the rules and Instructions applicable to such revisions in effect at the time those revisions were filed. Accordingly, the Commission should reverse the Bureau’s decision, direct the Bureau to adopt uniform deadlines for filing revisions to Form 499-As irrespective of whether they would increase or decrease a carrier’s contributions to federal support mechanisms, and direct USAC to accept SBC’s and other carriers’ Form 499-A revisions insofar as those revisions included the requisite explanations and documentation.

II. BACKGROUND.

Over the past three years, SBC and almost 20 other carriers have filed with the Commission requests for review of decisions by the Universal Service Administrative Company (“USAC”) rejecting revised Form 499-As for prior years if the revisions would have resulted in reduced contributions.⁴ USAC routinely has accepted any revision that would result in increased contributions to federal support mechanisms.

² *Id.* at para. 9, citing *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, Report and Order and Second Order on Reconsideration, CC Docket Nos. 96-45, 97-21, 12 FCC Rcd 18400 (1997) (*Second Order on Reconsideration*); *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements*, Report and Order, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, 14 FCC Rcd 16602 (1999) (*Form Consolidation Order*); 47 C.F.R. § 54.711(c).

³ *Form Consolidation Order* at para. 40; 47 C.F.R. § 54.711(c).

⁴ *Form 499-A Modification Order* at Appendix A.

In SBC's case, on June 24, 2004, SBC submitted to USAC revised Form 499-As for each of the five Ameritech Operating Companies for 1999 through 2002 (reporting revenues from 1998 through 2001).⁵ SBC explained that it was submitting the revised forms to correct various errors on those companies' Form 499-As that it had only recently discovered when SBC was reviewing the accounting practices of each of its operating company subsidiaries to implement the Commission's Order to implement interim reforms to its universal service contribution methodology.⁶ SBC further explained that these errors resulted from mistakes in the way the Ameritech companies mapped certain of their financial accounts to various lines on the Form 499-A during the years in question, and that these errors resulted in overstatements and understatements of those companies' interstate revenues and, concomitantly, their Universal Service Contribution bases for 1999 through 2002. SBC further reported that these errors resulted in a net underpayment by the Ameritech Operating Companies of \$2.8 million, and submitted a payment in that amount concurrently with the corrected Form 499-As for 1999-2002.

On September 9, 2004, USAC sent letters to three of the Ameritech Operating Companies – Michigan Bell, Indiana Bell and Ohio Bell – notifying them that it rejected six of the 18 revised 499-As filed by SBC for the years in question; USAC accepted the other 12 revised forms. Upon reviewing these letters, it became clear that USAC accepted the 12 revised Form 499-As that showed net underpayments to USAC by the affected companies, and rejected only those revised forms that showed net overpayments in universal service contributions by three of the Ameritech Operating Companies, and which would have resulted in a credit to those companies. USAC thus accepted any revised form that produced additional USF contribution payments, but rejected any revisions that would have resulted in credits – including to the very

⁵ The Ameritech Operating Companies include Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell Telephone Company.

⁶ *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlines Contributor Reporting Requirements Associated with Administration of the Telecommunications Relay Service*, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 51-166, 98-170 and NSD File No. L-00-72, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952 (2002).

same companies. USAC's stated basis for rejecting the six revised Form 499-As was that the revisions were not submitted within one year of the original submission.

On November 9, 2004, SBC appealed, asking the Commission to reverse USAC's decisions to reject the six revised Form 499-As that would have resulted in credits to Ohio Bell, Michigan Bell and Indiana Bell, but accept revisions that resulted in additional contribution payments for those same companies, even though all such revisions were filed more than one year past the original deadline.⁷ SBC argued that USAC's decision was improper for several reasons: (1) USAC lacked authority to create substantive rules or policies governing the USF programs, and thus could not impose a one-year limit on submitting evidence of an overpayment; (2) USAC's disparate treatment of revisions to Forms 499-A based on whether they result in a credit or additional USF contributions was arbitrary and an abuse of discretion; and (3) USAC's decision was bad policy.

On December 9, 2004, in response to SBC's petition and petitions by approximately 20 other carriers, the Bureau released an order adopting, for the first time, a firm deadline for filing revisions to Form 499-As, but only for revisions that would reduce a carrier's contributions.⁸ Prior to that order, a contributor was required to submit a revised Form 499-A if it discovered errors on a previously submitted form, irrespective of when the errors were discovered or whether the errors would result in reduced or increased contributions. The only additional requirement was that, if a contributor discovered errors after December 1 of the same filing year, the contributor was required to submit an explanation of the cause for the change along with documentation showing how the revised figures were derived from corporate financial records.⁹

⁷ Appeal of Decisions of the Universal Service Administrative Company Concerning SBC Communications' Revision to Form 499-A and Application of Charges, CC Docket Nos. 96-45, 97-21 (filed Nov. 9, 2004).

⁸ *Form 499-A Modification Order* at paras. 1-3.

⁹ Instructions to the Telecommunications Reporting Worksheet, Form 499-A at page 11 (April 2004) ("Form 499-A Instructions"). In the *Form 499-A Modification Order*, the Bureau erroneously suggests that a contributor was not obligated to file a revised Form 499-A after the original December 1 deadline for filing revisions, stating that, "[i]f there is good cause to go beyond the December 1 deadline, a carrier *may* file a revision late if the revision is accompanied by an explanation of the cause for the change." *Form 499-A Modification Order* at para. 6 (emphasis added). In fact, such revisions were mandatory. Moreover, neither the Instructions to Form 499-A nor the

Although neither the Instructions to Form 499-A nor any Commission rule or order authorized any limits on accepting a revised Form 499-A more than one year past the original deadline, provided it included an explanation of the cause for the change and supporting documentation, USAC adopted processing guidelines pursuant to which USAC rejected any revised form filed more than one year after the original deadline if the revision reduced a contributor's universal service obligation.¹⁰

In the *Form 499-A Modification Order*, the Bureau acknowledged that the Instructions to Form 499-A and the Commission's rules and orders placed no limit on the submission of a revised Form 499-A, and thus that USAC had no authority to reject a revised form that decreased a carrier's contribution if it was submitted more than one year past the original deadline.¹¹ The Bureau therefore granted – in part – SBC's and other carrier's petitions for review, directing USAC “to consider if there was good cause to allow revisions [that reduce a carrier's contributions to federal support mechanisms] beyond the deadline contained in the instructions,” which the Bureau claimed was the “standard currently in effect.”¹²

The Bureau went on, however, to adopt a twelve-month deadline for filing revisions to the Form 499-A that would result in decreased contributions for prior years¹³ – the Bureau imposed no comparable limitation on the obligation to file revisions that would result in increased contributions. The Bureau sought to justify this deadline on the grounds that it would

Commission's rules and order provided that revisions more than one year past the deadline must demonstrate good cause for going beyond the deadline. Rather, the Instructions state only that a “[r]evision filed after [the deadline] must be accompanied by an explanation of the cause for the change.” Form 499-A Instructions at page 11.

¹⁰ *Form 499-A Modification Order* at para. 7, citing Universal Service Administrative Company, Board of Directors Meeting, July 27, 1999 Minutes, <http://www.universalservice.org/board/minutes/board/072799.asp>.

¹¹ *Id.* at para. 13.

¹² *Id.* Insofar as the Bureau directed USAC to accept revisions only where there is “good cause,” the Bureau imposed a standard for accepting revisions that currently is not incorporated into the Commission's rules and orders or in the Form 499-A Instructions. As noted above, the Form 499-A Instructions require only that a revision explain the cause for the change – they do not say that there must be good cause, nor do they offer any explanation of what constitutes “good” cause. Form 499-A Instructions at 11.

¹³ *Form 499-A Modification Order* at 10.

“improve administrative efficiency” and “help ensure the stability and sufficiency of the federal universal service fund” by reducing the need for adjustments for a given contribution year.¹⁴ The Bureau further asserted that 12 months is sufficient for contributors to revise their Form 499-A filings for purposes of reducing their contribution obligations.¹⁵ However, the Bureau offered no explanation why it limited the “firm” deadline for filing revised Form 499-As only to revisions that would reduce a carrier’s contributions, nor did it explain why the factors it cited as support for a firm deadline do not apply equally to revisions that would increase a carrier’s contributions.

The Bureau acknowledged that it only has delegated authority to make changes to administrative aspects of the Form 499-A reporting requirements, and not to change the substance of the underlying programs. The Bureau claimed, however, that it had authority to adopt the foregoing deadline because, the Bureau asserted, the deadline constituted a procedural, non-substantive change to the Form 499-A reporting requirements.¹⁶ The Bureau further asserted that, because the new, firm deadline purportedly is procedural, the notice and comment requirements of section 553 of the Administrative Procedure Act (“APA”) do not apply.¹⁷

III. ARGUMENT.

The Bureau’s decision to impose a firm deadline for revisions that would reduce a carrier’s contributions, but not for revisions that would increase contributions, is not only beyond the Bureau’s authority, but also arbitrary and capricious and bad policy. Moreover, the Bureau’s remand to USAC of SBC’s six revised Form 499-As with directions to accept those filings only “if there is good cause to allow revisions beyond the deadline contained in the Instructions” is inconsistent with the rules and Instructions applicable to such revisions in effect at the time those revisions were filed. The Commission therefore should reverse the Bureau’s decision to

¹⁴ *Id.*

¹⁵ *Id.* at para. 11.

¹⁶ *Id.* at para. 9.

¹⁷ *Id.*, citing 5 U.S.C. § 553(b)(3)(A).

prospectively impose a firm deadline on Form 499-A revisions that would result in reduced contributions, and direct USAC to accept SBC's and other carriers' Form 499-A revisions insofar as those revisions included the requisite explanations and documentation.

A. The Firm Deadline Adopted by the Bureau is a Substantive Rule, and Therefore Beyond the Bureau's Authority.

As the Bureau itself acknowledged, it possesses no authority to establish substantive rules or policies governing the USF and other universal service support programs, including substantive rules relating to contributor reporting requirements.¹⁸ In the *Second Order on Reconsideration*, the Commission adopted section 51.711 of the Commission's rules, requiring carriers to report revenue information to USAC.¹⁹ In that same order, the Commission delegated authority to the Bureau to waive, reduce or eliminate contributor reporting requirements associated with the universal service support program.²⁰ In a subsequent order, the Commission adopted a new consolidated form – FCC Form 499-A – for reporting carrier revenues,²¹ and reaffirmed its delegation of authority to the Bureau to modify contributor reporting requirements.²² The Commission also made clear that this delegation was narrowly circumscribed, emphasizing that it “extend[ed] only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.”²³

Despite the Commission's express and clear prohibition against the Bureau making substantive changes to the reporting requirements or adopting substantive rules, it has done just that in this case. While the Bureau contends that its decision to impose a firm, 12 month deadline on Form 499-A revisions that would decrease a carrier's USF contributions (but impose

¹⁸ *Form 499-A Modification Order* at para. 9.

¹⁹ *Second Order on Reconsideration*, 12 FCC Rcd at 18442, 18480.

²⁰ *Id.* at 18442.

²¹ *Form Consolidation Order* at para. 9.

²² *Id.* at para. 39.

²³ *Id.*

no comparable limitation on revisions that would increase a carrier's contributions) is only "procedural,"²⁴ in fact, its decision establishes a substantive rule that only may be adopted by the full Commission. Even then, the Commission could adopt such a rule only after complying with the notice and comment requirements of section 553 of the Administrative Procedures Act ("APA").²⁵

Section 553 of the APA generally requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's adoption, amendment or modification "to assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."²⁶ The Bureau correctly observes that the APA provides that "rules of agency organization, procedure, or practice" are exempt from these procedures.²⁷ However, as the D.C. Circuit repeatedly has admonished, the exceptions to section 553's notice and comment requirements must be narrowly construed to ensure that the exceptions do not defeat the purposes behind the APA's notice and comment requirements.²⁸ The D.C. Circuit has further cautioned that the "procedural rule"

²⁴ *Form 499-A Modification Order* at para. 10 n.31.

²⁵ 5 U.S.C. § 553.

²⁶ *American Hospital Ass'n. v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (*American Hosp. Ass'n*), citing *Guardian Federal Savings and Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1980); 5 U.S.C. § 553.

²⁷ *Form 499-A Modification Order* at para. 9, citing 5 U.S.C. § 553(b)(3).

²⁸ *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989) ("the APA's procedural rule exception is to be construed very narrowly"); *American Hosp. Ass'n*, 834 F.2d at 1044 ("Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones. . . . In light of the obvious importance of the[] policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive."); *Alcaraz v. Block*, 746 F.2d 593, 612 (D.C. Cir. 1984) ("The exceptions to section 553 will be 'narrowly construed and only reluctantly countenanced.'" (citations omitted); *National Ass'n of Home Health Agencies v. Schwieker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (exceptions to the notice and comment requirements in section 553 are to be recognized "only reluctantly," so as not to undermine the "salutary purposes behind [those requirements]"), *cert denied*, 459 U.S. 1205 (1983). The policies of maximum participation and full information that underlie the APA's notice and comment requirements squarely support application of those procedures here. For example, had the Commission solicited comment on the Bureau's proposed firm deadline, carriers could have pointed out the obvious regulatory asymmetry and lack of fairness that results from imposing a firm deadline only for revisions that would decrease contributions. Interested parties also could have offered other solutions that are symmetrical, but still meet the Bureau's objectives of administrative efficiency and certainty for the contribution system. For example, the Commission could adopt a solution similar to that of the Internal Revenue Service, which permits amended tax returns for three years, irrespective of whether they

exception does not apply where the agency action “encodes a substantive value judgment or *puts a stamp of approval or disapproval on a given type of behavior.*”²⁹

The Bureau’s adoption of a firm, 12 month deadline only for revisions that would decrease a carrier’s contributions to federal support mechanisms, with no corresponding deadline for revisions that would increase a carrier’s contributions, plainly “encodes a substantive value judgment” that “puts a stamp of approval or disapproval” on certain types of behavior. By affording disparate treatment to revisions depending on whether they would increase or decrease a carrier’s contribution, the Bureau’s decision plainly reflects a substantive, value judgment about which revisions should be accepted more than one year past the original filing deadline. The firm deadline adopted by the Bureau thus is more than a mere administrative or organizational measure. It is a decisional rule that directly affects contributors and the USF as a whole.

The Bureau cites the D.C. Circuit’s decision in *JEM Broadcasting Company* as support for its claim the “firm deadline” for certain Form 499-A revisions is procedural – indeed, the Bureau offers no other analysis or support for this conclusion. In that case, the D.C. Circuit held that the Commission’s “hard look” rules, which permitted amendments to broadcast license applications only during a 30-day window, were procedural and thus not subject to the APA’s notice and comment requirements.³⁰ However, the Commission’s “hard look” rules established a firm deadline for that applied across the board to all such amendments. Here, in contrast, the “firm deadline” adopted by the Bureau applies only to certain Form 499-A revisions but not

would increase or decrease a taxpayer’s tax payments, but imposes a penalty on amended returns that would increase a taxpayer’s payments to provide incentives for taxpayers to file accurate returns in the first place.

²⁹ *American Hosp. Ass’n*, 834 F.2d at 1047 (emphasis added); see also *Public Citizen v. Dept. of State*, 276 F.3d 634, 641 (D.C. Cir. 2002) (holding that a State Department policy of declining to produce documents produced after the date of a FOIA request was procedural because it “applie[d] to all FOIA requests, making no distinction between requests on the basis of the subject matter, [and therefore] it clearly encode[d] no ‘substantive value judgment’”) (citing *American Hosp. Ass’n*, 834 F.2d at 1047); *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 328 (D.C. Cir. 1994) (noting that the procedural exception does not apply where the agency’s decision “encodes a substantive value judgment”) (citations omitted); *Reeder v. FCC*, 865 F.2d at 1305.

³⁰ *JEM Broadcasting Company*, 22 F.3d 320.

others. As a consequence, the Bureau's citation to *JEM Broadcasting Company* is wholly inapposite.³¹

Because the Bureau's firm deadline "encodes a substantive value judgment" that approves some revisions but not others, the Bureau's adoption of that deadline was unauthorized and inappropriate. Even if a firm deadline only for revisions that decrease contributions were appropriate (which, as discussed below, it is not), adopting such a deadline would require action by the Commission, and, even then, only after following notice and comment procedures. The Bureau's adoption of the firm deadline thus not only exceeds its delegated authority, but also violates the Administrative Procedures Act and basic notions of due process under the Fifth Amendment of the U. S. Constitution.

Moreover, the firm deadline adopted by the Bureau conflicts with the Commission's rules, which expressly contemplate that carriers can obtain a refund of excessive contributions, without consideration of any time limit. In particular, section 54.713 of the Commission's rules provides that, "[o]nce a contributor complies with the Telecommunications Reporting Worksheet filing requirements, the Administrator may refund any overpayments made by the contributor, less any fees, interests, or costs."³² By denying carriers any opportunity to obtain a refund of overpayments to the USF, the Bureau's firm deadline conflicts with the express intent of the rules.

B. The Bureau's Decision is Arbitrary And An Abuse of Discretion

Even if the Bureau had authority to adopt a firm deadline Form 499-A revisions that would decrease a carrier's contributions, its decision is manifestly arbitrary, capricious, and

³¹ See *Public Citizen v. Dept. of State*, 291 F.3d at 641 (concluding that the Department's cut-off policy for FOIA requests did not encode a substantive value judgment because it applied to *all* FOIA requests without distinction); *JEM Broadcasting Company*, 22 F.3d at 328 (noting that the procedural exception to notice and comment does not apply where an agency's decision or policy encodes a substantive value judgment). Had the Bureau adopted a firm deadline for all revisions, regardless of whether they increased or decreased a carrier's contributions to federal support mechanisms, the deadline might well be properly characterized as "procedural" – a matter that SBC does not address here.

³² 47 C.F.R. § 54.713

unfair, and thus an abuse of discretion. As an initial matter, its policy is striking in its asymmetry. The Bureau's new deadline narrowly constrains a carrier's ability to revise its Form 499-As to accurately reflect its revenues if doing so would result in a reduction in that carrier's contribution base and thus a credit for overpayments to the universal service fund. At the same time, however, the Bureau applies no corresponding limit to revisions that would increase a carrier's contribution base, and thus its contributions to the fund. It is patently unfair to require a carrier to revise its Form 499-A more than one year past the original filing deadline if it would increase that carrier's contribution obligation, while strictly limiting the same carrier's ability to obtain a refund of overpayments to the universal service fund.

The Bureau justifies adoption of a firm deadline for revisions that would decrease a carrier's contributions on the grounds that a firm deadline will improve efficiency, help ensure the stability and sufficiency of federal support mechanisms, and provide incentives for carriers to submit accurate revenue information in a timely manner.³³ However, the Bureau cannot have it both ways. If a firm deadline is necessary to promote efficiency and ensure the stability of federal support mechanisms, it should apply to all revisions – irrespective of whether the revisions would increase or decrease a carrier's contributions.

C. The Bureau's Decision Is Bad Public Policy

The firm deadline adopted by the Bureau also will encourage carriers not to correct errors in reported revenues on their Form 499-As. To date, carriers have reported revenues to USAC with the expectation that they will receive credit for overpayments if they discover that they have over-reported revenues and made excess contributions.³⁴ If the Bureau's decision stands, carriers will be reluctant to review their Form 499-A filings from prior years and make any revisions to

³³ *Form 499-A Modification Order* at paras. 10-11.

³⁴ *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T, Report and Order and Order on Reconsideration*, 16 FCC Rcd 5748, 5733 at ¶12 (2001).

correct honest mistakes for fear that they will be liable for any underpayments but receive no credit for overpayments, undermining the integrity of the program.

The Bureau's new deadline also will result in substantial over-collection of USF contributions from certain carriers. For example, if the Bureau's policy applied to SBC's revisions, SBC would be forced to contribute almost \$2 million more than it was required to contribute based on its actual revenues. The Bureau's decision thus will result in significant over-payments of USF contributions over time, distorting the program contrary to the express statutory requirement that any USF support mechanisms be equitable and non-discriminatory.

D. The Bureau's Decision Is Inconsistent with the Existing Rules Governing Form 499-A Revisions.

In the *Form 499-A Modification Order*, the Bureau erroneously suggests that a contributor was required to demonstrate good cause for filing a revised Form 499-A after the original December 1 deadline for filing revisions.³⁵ And, based on this error, remanded SBC's and other carriers' Form 499-A revisions to USAC with directions "to consider if there was good cause to allow revisions [that reduce a carrier's contributions to federal support mechanisms] beyond the deadline contained in the instructions," which the Bureau claimed was the "standard currently in effect."³⁶

However, neither the Instructions to Form 499-A nor the Commission's rules and order provide that revisions more than one year past the deadline must demonstrate good cause for going beyond the deadline. Rather, the Instructions state only that a "[r]evision filed after [the deadline] must be accompanied by an explanation of the cause for the change."³⁷ Thus, under

³⁵ *Form 499-A Modification Order* at para. 6 ("If there is good cause to go beyond the December 1 deadline, a carrier may file a revision late if the revision is accompanied by an explanation of the cause for the change.").

³⁶ *Id.* at para. 13. Insofar as the Bureau directed USAC to accept revisions only where there is "good cause," the Bureau imposed a standard for accepting revisions that currently is not incorporated into the Commission's rules and orders or in the Form 499-A Instructions. As noted above, the Form 499-A Instructions require only that a revision explain the cause for the change – they do not say that there must be good cause, nor do they offer any explanation of what constitutes "good" cause. Form 499-A Instructions at 11.

³⁷ Form 499-A Instructions at page 11.

the rules in effect at the time SBC submitted its revisions, carriers were required only to explain the cause for the change and provide documentation, and the Bureau's direction to the USAC to accept revisions only where there is "good cause" imposed a standard for revisions that currently is not incorporated into the Commission's rules and orders or in the Form 499-A Instructions. Accordingly, the Commission should reverse the Bureau's decision, and direct USAC to accept SBC's and other carriers' Form 499-A revisions insofar as those revisions included the requisite explanations and documentation.

IV. CONCLUSION

In light of the foregoing, the Commission should reverse the Bureau's decision, direct the Bureau to adopt uniform deadlines for filing revisions to Form 499-As irrespective of whether they would increase or decrease a carrier's contributions to federal support mechanisms, and direct USAC to accept SBC's and other carriers' Form 499-A revisions insofar as those revisions included the requisite explanations and documentation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Toyin Harris do hereby certify that on this 13th day of September 2010 a copy of the foregoing **“AT&T Application for Review of Action Taken Pursuant to Delegated Authority”** was served via U.S. first class mail, postage paid, to the parties listed below:

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